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Of all questions of fact, it would seem that this is peculiarly appropriate for Congress, and peculiarly inappropriate for the court.⁹ Mr. Justice McReynolds, in his dissenting opinion, attempts to draw a distinction between the scope to be allowed Congress in the exercise of an express power and that to be allowed it in the exercise of an implied power. That attempted distinction Mr. Justice Brandeis effectively explodes. In the first place, it is hard to see why the power to pass acts for the carrying on of war is not expressly given to Congress;¹⁰ in the second, assuming the power is only implied, the question of whether the power is there because the Constitution says it exists, or because the court says the Constitution must mean that it exists, is only a preliminary one—given the existence of the power, the court has only one standard for deciding how far it goes.

Whether peace has come is not a question of fact but a question of expediency; not a fact, but the way facts should be met, is involved. With our troops in Siberia and on the Rhine, with the economic life of the country and of the world still profoundly disorganized, the situation at the time *Ruppert v. Caffey* was decided shows the wisdom of making the absence of Presidential proclamation or Congressional resolution conclusive. But the significance of the dissent in *Ruppert v. Caffey* is much more startling. By the narrow margin of a single vote the court has repudiated a doctrine which, applied, might make an error of the justices in prophesying the outcome of an armistice result in irreparable disaster.

“MOVABLE EFFECTS” AND STATUTORY INTERPRETATION. — The American courts have given but little conscious recognition to the competing methods of statutory interpretation which have called forth much controversy on the continent of Europe in recent years.¹ Rarely, indeed, is recognition given to the view that different modes of interpretation may lead to diverse conclusions in the decision of a particular case. Owing, perhaps, to the fact that the courts are unwilling to recognize that judicial interpretation of statutes involves, by and large, a certain amount of judicial law-making, the theory of statutory interpretation in American law has not received the critical and systematic treatment which has been given to other parts of the law.

The case of *Estate of Castle*² is a recent example. Here the court was

⁹ In *Martin v. Mott*, 12 Wheat. (U. S.) 19 (1827), it was held that, under an act of Congress passed under its constitutional power to provide for the calling forth of the militia, giving the President power to call forth the militia in an emergency, not only was the action of the President in calling it out not reviewable, but the avowry was not defective in not stating that the emergency existed.

¹⁰ “The Congress shall have power to declare war . . . to raise and support armies, . . . to provide and maintain a navy . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Art. I, Section 8, of the Constitution.

¹ See Roscoe Pound, “Enforcement of Law,” 20 GREEN BAG, 401. For more extended discussions of the subject, see GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, 2 ed., Paris, 1919; SCIENCE OF LEGAL METHOD (The Modern Legal Philosophy Series, Vol. IX), Boston, 1917, Part I.

² 25 Hawaii, 38 (1919).

called upon to determine whether insurance policies procured by a married man upon his life, payable to his personal representatives, were a part of his "movable effects, in possession or reducible to possession, at the time of his death," under a Hawaiian statute giving the widow dower.³ The case raises several interesting questions:

(1) Were these policies of insurance a part of the husband's "effects"? The court intimates that they were not, in the following language: "The right to the amount due upon the policy does not come into existence until after the death of the insured. The money belongs to the insurer who is charged with the duty created by the contract to pay the beneficiaries. The only thing which the insured can grant is an interest in the contract."⁴ The modern conception of a "right" is that it is a legally protected interest.⁵ That the insured has such an interest in the contract of insurance (at least, where it is payable to his estate or his personal representative) is shown by the fact that the policy may be subjected to the payment of his debts,⁶ and will pass to his assignee in bankruptcy.⁷ While the insured does not ordinarily obtain the face amount of a straight life or limited payment policy, because the amount is not payable until after his death, yet in exceptional cases he may claim the full amount.⁸ It seems difficult to contend, then, that the insured in the principal case did not have a chose in action which was a part of his property⁹ and of his "effects."¹⁰

(2) Was the insurance policy a part of his "*movable effects*"? The method of statutory interpretation adopted by the court is predominantly "analytical."¹¹ That is, the court treats the statute as an expression of the will of the legislature which created law as of the date of its enactment, and the only function which the court assumes is that of ascertaining by a purely logical process the legislative will so expressed.

³ The statute (REVISED LAWS OF HAWAII, 1915, § 2977) reads: "Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for a term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

⁴ 25 Hawaii, 41 (1919).

⁵ See Roscoe Pound, "Legal Rights," INT. JOUR. ETHICS, October, 1915, pp. 92-116; BEALE, A TREATISE ON THE CONFLICT OF LAWS, § 139.

⁶ See RICHARDS, INSURANCE, 3 ed., §§ 71, 72.

⁷ United States Bankruptcy Act of 1898 (30 STAT. AT L. 566), § 70a, 1 FED. STAT. ANN., 2 ed., 1196; *Hiscock v. Mertens*, 205 U. S. 202 (1906). See JOYCE, INSURANCE, 2 ed., § 2341.

⁸ Thus, in *People v. The Knickerbocker Life Insurance Co.*, 40 Hun (N. Y.), 44 (1886), the insurer became insolvent, and the insured being so aged and afflicted as to make it impossible for him to procure other insurance, the court held that the referee properly allowed his claim as for a death claim.

⁹ See Williston, "Can an Insolvent Debtor Insure his Life for the Benefit of his Wife?" 25 AM. L. REV. 185, 187; RICHARDS, note 6, *supra*.

¹⁰ See 1 BOUVIER'S LAW DICTIONARY, Rawle's ed., 975. In *Schondler v. Wace*, 1 Camp. 487, 488 (1808), Lord Ellenborough held that an insurance policy was a part of a bankrupt's "effects" within the meaning of the English bankruptcy statute.

¹¹ See Pound, "Enforcement of Law," 20 GREEN BAG, 404. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, 1909, § 370, for a statement of the fundamental misconception of this method of interpretation. Cf. 2 AUSTIN, JURISPRUDENCE, 4 ed., 1023-1036.

The question is as to the meaning of the word "movable" at that date. The "common law of England, as ascertained by English and American decisions," is adopted as the common law of the Territory of Hawaii.¹² It seems clear that neither "movable" nor "movables" is a "word of art" in Anglo-American common law.¹³ The classic division of property in our law is that into "real" and "personal." Probably this distinction originated historically in the "physical difference between immovable land or tenements and movable articles or chattels" which "was at the bottom of Bracton's test for the classification of actions,"¹⁴ but the modern terms "real" and "personal" do not coincide with "immovable" and "movable," respectively.¹⁵ Is an insurance policy a "movable" in the ordinary sense? It may be noted that the written policy is not a specialty,¹⁶ but is treated merely as evidence of the contract between the insured and the insurer.¹⁷ Hence, the insured's property was not in the written document but in the chose in action of which it was evidence. Several ingenious arguments have been advanced to show that choses in action are to be classed as "movables" in the ordinary sense of the term. Thus, it has been argued that since the right is immediately against a person and since persons are movable and can change their residences at will, the right itself is "movable."¹⁸ A sufficient answer to this reasoning is, that not all persons are "movable" (e. g., municipal corporations), and that, moreover, the immediate object of a right *in personam* is not the person of the obligor.¹⁹ Another line of reasoning is that the object of the right is the will or act of the person obliged,²⁰ and that obligations which involve the doing or not doing of an act are, accordingly, "movable."²¹ In truth, however, the terms "movable" and "immovable" are strictly applicable, in their ordinary meanings, only to corporeal objects, not to abstract incorporeal rights, such as choses in action;²² and from the "analytical" point of view the decision in the principal case is correct.²³

The "historical" method of interpretation of statutes involves an inquiry into the previously existing law, of which the statute is regarded as a continuation and development.²⁴ The original provision as to dower

¹² See 1915 REV. LAWS, § 1: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage."

¹³ *Strong v. White*, 19 Conn. 238 (1848).

¹⁴ T. Cyprian Williams, "The Terms Real and Personal in English Law," 4 L. QUART. REV. 394, 407.

¹⁵ See Williams, note 14, *supra*. HOLLAND, JURISPRUDENCE, 10 ed., 100.

¹⁶ See 32 HARV. L. REV. 1, 10; 33 HARV. L. REV. 198, 200.

¹⁷ *Ibid.*

¹⁸ See I JOANNIS VOET, COMM. AD PAND., I ed., p. 8, § 21 (1698). The reference is to the fifth edition, 1827.

¹⁹ See I WÄCHTER, PANDEKTEN 285, note (1880).

²⁰ *Ibid.*

²¹ See I PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 6 ed., No. 2232.

²² I PLANIOL, *supra*, No. 2195; I DERNBURG, PANDEKTEN, 7 ed., § 74.

²³ *Strong v. White*, *supra*, note 13; *Jackson v. Vandersprengle*, 2 Dall. (U. S. Sup. Ct. Pa.) 142 (1792) ("movable" in will; rule of *ejusdem generis* applied). But see *Peniman v. French*, 17 Pick. (Mass.) 404 (1835).

²⁴ See note 11, *supra*.

in Hawaii gave the widow a life estate in one third of the husband's "immovable and fixed property," and an absolute property in one third of his "movable effects."²⁵ This provision was a part of the compilation of laws made by John Ricord, a former member of the bar of New York, who was appointed Attorney-General of the kingdom in 1844.²⁶ Prior to its adoption the islands had no coherent body of law.²⁷ These statutes were translated into the native language by a clergyman, Rev. William Richards.²⁸ While the compilation is evidently based upon the English common law,²⁹ yet the courts were authorized to cite and adopt "the reasonings and analogies of the common law and of the civil law . . . so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom."³⁰ Whether or not the terms "immovable" and "movable"³¹ were consciously borrowed from the civil law³² or were adopted as a result of the exigencies of translation into the native language,³³ the court, adopting the analogy of the civil law, could readily have found that the term "movable effects" in the dower statute had a *technical* meaning which included choses in action. Thus, by the French Civil Code, the division of property into "immovables" (*immeubles*) and "movables" (*meubles*) is exhaustive, and the latter clearly embraces choses in action for a money payment,³⁴ and this classification is recognized in those states of the United States which have adopted codes derived in part from the French Code.³⁵ In nineteenth-century German law, too, the term "movable thing" (*bewegliche Sache*) included a chose in action.³⁶ When, therefore, in 1859 the dower

²⁵ See 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA (1846), § IV, p. 59.

²⁶ See JAMES JACKSON JARVES, HISTORY OF THE HAWAIIAN ISLANDS, 3 ed., 190.

²⁷ See JARVES, *supra*, 199.

²⁸ See 1 STATUTE LAWS, ETC., preface, 6.

²⁹ *Ibid.*, 7.

³⁰ 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III (1847), 5. (In Matter of Vida, 1 Haw. 63 (1852), the court refused to be bound by the English common-law definition of "immovable and fixed property" and held that a widow was entitled to dower in a leasehold. The English common law was not adopted until January 1, 1893. See LAWS OF 1892, chap. 57, § 5; Mossman v. Hawaiian Government, 10 Hawaii, 421, 436 (1896).)

³¹ In 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III (1846), § III, p. 58, the husband's marital property rights are defined in terms practically identical with those of the common law, except that "immovable" and "movable" are everywhere substituted for "real" and "personal."

³² American lawyers of the early nineteenth century were perhaps more familiar with the civil law than are those of to-day. See Pound, "The Philosophy of Law in America," 7 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE, 385, 391.

³³ The terms "immovable" and "movable" may have been more readily translatable into the native language than such artificial terms as "real" and "personal." The conjecture is strengthened by the fact that in an opinion given in 1844, Attorney-General Ricord said: "The third part of the real property goes to the widow as a mere life estate, and the third part of the personal property goes to her absolutely." Matter of Vida, 1 Hawaii, 63, 64 (1852).

³⁴ See FRENCH CIVIL CODE, Arts. 527, 529; 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 6 ed., No. 2249; 1 BAUDRY-LACANTINIERE, PRÉCIS DE DROIT CIVIL, 12 ed., Nos. 1271, 1304.

³⁵ See CIVIL CODE OF LOUISIANA, Art. 474 (466); CALIFORNIA CIVIL CODE, §§ 657, 663; NORTH DAKOTA COMPILED LAWS, 1913, §§ 5248, 5253; SOUTH DAKOTA CIVIL CODE, §§ 185, 190. In reference to the three last named, cf. DAVID DUDLEY FIELD'S DRAFT CIVIL CODE FOR NEW YORK, § 162.

³⁶ ARNDTS, LEHRBUCH DER PANDEKTEN, 10 ed., § 50; 1 WINDSCHEID, LEHRBUCH

statute was given its present form by the substitution of common-law terms for "immovable and fixed property,"³⁷ the term "movable effects" continued to have its original meaning; nor was this changed by implication when the Anglo-American common law was adopted in 1893.³⁸

A third method, or rather tendency, in statutory interpretation, called the "equitable," "conceives of the legislative rule as a general guide to the judge, leading him toward the just result,"³⁹ but insists that within wide limits he shall use his discretion in bringing about such a result. Thus, one representative of this school or tendency has argued that in case the judge has to choose between two competing interpretations, he should choose that one which is most in accordance with the "social ideals of the epoch."⁴⁰ One needs no argument to prove that the extension of married women's property rights is an ideal of the modern epoch, and the court in the principal case should therefore have adopted the more extensive interpretation. Or, if one dislikes the flavor of novelty in this suggestion, one can resort to no more modern a person than Lord Coke for the principle that "three things be favored in law: life, liberty and dower"⁴¹—a maxim approved by the Hawaiian court in an earlier case.⁴²

(3) The words "in possession, or reducible to possession," in the statute do not exclude the possibility of its extending to choses in action; rather they are indicative of a survival of the primitive conception of a chose in action as a proprietary right. The early English law treated the action of debt as proprietary; the defendant was conceived of as having in his possession something belonging to the plaintiff which he ought to surrender.⁴³ The abstract idea of a chose in action as a *vinculum juris* comes from the Roman law, and in Blackstone's time had hardly ousted the primitive concept from English legal parlance.⁴⁴ The Hawaiian Court in 1893 defined a chose in action as "a right not reduced to possession."⁴⁵ Here again the analytical method of interpretation seems inferior to the historical.

It is submitted, therefore, that the decision in the principal case is not well grounded.

AGENT'S LIABILITY ON CONTRACTS MADE FOR UNDISCLOSED PRINCIPAL. — It is always easy for an agent in making a simple contract to avoid liability. He may do so by signifying that he is not to be held,¹ or,

DES PANDEKTENRECHTS, 6 ed., § 139, note 5. The terms *res immobiles* and *res mobiles* in the Roman law probably extended only to corporeal things. See the last two citations and PLANIOL, *supra*, No. 2195.

³⁷ See CIVIL CODE OF THE HAWAIIAN ISLANDS, 1859, § 1299.

³⁸ See note 30, *supra*.

³⁹ See Pound, "Enforcement of Law," 20 GREEN BAG, 405.

⁴⁰ See Stammler, "Wesen des Rechts und der Rechtswissenschaft," in SYSTEMATISCHE RECHTSWISSENSCHAFT (1913), 1-65, especially 44-45 and 56-57.

⁴¹ See 2 COKE UPON LITTLETON, c. 11, 124 b.

⁴² Matter of Vida, 1 Hawaii, 63, 65 (1852).

⁴³ See AMES, LECTURES ON LEGAL HISTORY, 88.

⁴⁴ 2 COMM. 397.

⁴⁵ *In re Kealiahonui*, 9 Hawaii, 1, 6 (1893), quoting ANDERSON'S LAW DICTIONARY. Similar language is used in 2 BOUVIER'S DICTIONARY 2265 (1914).

¹ See 1 WILLISTON, CONTRACTS, § 285.